



OFFICE OF THE COUNTY ATTORNEY

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County Executive

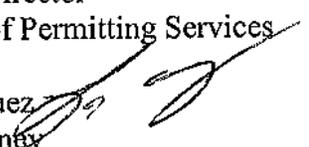
Leon Rodriguez
County Attorney

PRIVILEGED AND CONFIDENTIAL

MEMORANDUM

February 13, 2009

TO: Carla Reid, Director
Department of Permitting Services

VIA: Leon Rodriguez 
County Attorney

FROM: Clifford L. Royalty 
Chief, Division of Zoning, Land Use, & Economic Development

RE: Issuance of Building Permits for Underground Facilities

You have requested our opinion as to whether the Department of Permitting Services (“DPS”) may issue a building permit for the construction of a building under the public right-of-way.

Answer

DPS may not issue a permit for the construction of a building under a public right-of-way unless there are grounds to grant a modification under § 8-15 of the County Code.

Discussion

The construction of a building in the County requires the issuance of a permit under Chapter 8 of the Montgomery County Code. The applicable building standards are contained in Chapter 8 and in the ICC International Building Code (“IBC”), which was incorporated, by reference, into Chapter 8 in 2003. *See § 8-14.* With respect to below grade “encroachments” into the “public right-of-way,” the IBC states, in pertinent part, that:

A part of a building erected below grade that is necessary for structural support of the building or structure shall not project beyond the lot lines, except that the footings of street walls or their supports which are located at least 8 feet (2438

mm) below grade shall not project more than 12 inches (305 mm) beyond the street lot line. *2003 IBC § 3202.1.1.*¹

The IBC defines a building as “[a]ny structure used or intended for supporting or sheltering any use or occupancy.” *2003 IBC § 202*. A lot line is a “line dividing one lot from another, or from a street or any public place.” *2003 IBC § 202*.

The IBC does allow some structures to encroach upon the public right-of-way, below grade. For example, the IBC states that

[t]he construction and utilization of vaults and other enclosed space below grade shall be subject to the terms and conditions of the authority or legislative body having jurisdiction. *2003 IBC § 3202.1.2*.

We have found no IBC (or Chapter 8) definition of “vault” or “enclosed space.” Your office has advised that a “vault and other enclosed space” does not include a building or other such habitable space that is governed by IBC § 3202.1.1. We agree. As is clear from the above provisions, the IBC differentiates a building from a vault and applies more stringent standards to the former. DPS has adopted a longstanding administrative interpretation that the IBC (and thus by extension Chapter 8) does not allow not allow buildings, including parking garages, under the County’s right-of-way. In keeping with Maryland law, we defer to DPS’ administrative interpretation and we agree that the interpretation is consistent with the plain language of the IBC. *See e.g., Opert v. Criminal Injuries Compensation Board*, 403 Md. 587, 943 A.2d 1229 (2008).

Chapter 8 does allow DPS to vary the IBC standards through a modification under § 8-15. Section 8-15(a) states that

[w]hen there are practical difficulties and undue hardship involved in carrying out structural or mechanical provisions of this chapter, the direction may vary or modify such provision upon application of the owner or his representative; provided that the spirit and intent of the law shall be observed and public welfare and safety be assured.

The “practical difficulties and undue hardship” standards is exceedingly high and is rarely met. The “need sufficient to justify such an exception must be substantial and urgent and not merely for the convenience of the applicant . . .” *Carney v. City of Baltimore*, 201 Md. 130, 137, 93 A.2d 74, 76 (1952). The urgency must be such that an “injustice will result if the exception is

¹ We are aware that there is a more recent edition of the IBC, but that the pertinent language is unchanged from the 2003 edition.

not made.” *Carney*, 201 Md. at 136, 93 A.2d at 76. Indeed, of the recent applications for underground garages with which we are familiar, none would meet this standard.

We are aware that Chapter 50 allows for the issuance of a building permit “for an underground parking facility that crosses the vertical plan of any lot line, as projected below grade, or extends into a public right-of-way if that extension is approved by the appropriate public agency.” § 50-20(b)(4). That provision was codified in 1986. *See Subdivision Regulation Amendment No. 86-1.*

Insofar as the foregoing provision of Chapter 50 might be construed to conflict with Chapter 8, the provisions of each chapter must be harmonized. The rules of statutory construction, thus, come into play. The Maryland courts have acknowledged that, although the process of statutory interpretation begins with the language of the statute, even the clearest language must be informed by legislative history and by the need to avoid illogical results. *Kaczorowski v. Baltimore*, 525 Md. 628 (1987). Further, the rules of statutory construction provide that, when a legislature enacts a statute, it is aware of earlier enactments and that statutory language should be interpreted so as to avoid conflicts. *See Mayor and City Council of Baltimore v. Chase*, 360 Md. 121, 756 A.2d 987 (2000); *University System of Maryland v. The Baltimore Sun Company*, 381 Md. 79, 847 A.2d 427 (2004). Chapter 50 and Chapter 8 are best harmonized if Chapter 50 is not read to trump Chapter 8. And Chapter 50 does not purport to do so; the foregoing section of Chapter 50 merely allows for an encroachment that the “appropriate public agency” (which would usually be DPS) determines is legal. Chapter 50 should be read as allowing for a building permit to be issued for an underground parking facility that extends into the public right-of-way if Chapter 8, inclusive of the IBC, is otherwise met.

Please contact us if you would like to discuss our opinion.